

ENDANGERED SPECIES ACT AMENDMENTS OF 1978

SEPTEMBER 25, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MURPHY of New York, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 14104]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 14104) to authorize appropriations to carry out the Endangered Species Act of 1973 through fiscal year 1981, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 2, line 23, insert "final" after "the".

Page 2, after line 25, insert the following:

(4) in subsection (c) by inserting at the end thereof the following new paragraph:

(4) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

Page 3, line 1, strike out "(4)" and insert in lieu thereof "(5)".

Page 4, line 22, strike out "paragraph" and insert in lieu thereof "paragraphs".

Page 5, line 6, strike out all that follows the period:

Page 5, after line 6, insert the following:

(5) A final regulation adding a species to any list published pursuant to subsection (c) shall be published in the Federal Register not later than two years after the date of publication of notice of the regulation proposing such listing under paragraph (2)(A)(i). If a final regulation is not adopted within such two-year period, the Secretary shall withdraw the proposed regulation and shall publish notice of such withdrawal in the Federal Register not later than 30 days after the end of such period. The Secretary shall not propose a regulation adding to such a list any species for which a proposed regulation has been withdrawn under this paragraph unless he determines that sufficient new information is available to warrant the proposal of a regulation. No proposed regulation for the listing of any species published before the date of the enactment of the Endangered Species Act Amendments of 1978 shall be withdrawn under this paragraph before the end of the one-year period beginning on such date of enactment.

Page 5, line 7, strike out "(5)" and insert in lieu thereof "6".

Page 7, line 14, strike out "(2)(A)," and insert in lieu thereof "(1)".

Page 9, line 12, insert ", as determined by the Secretary," after "States".

Page 10, line 3, insert after the period the following:

If no appointment is made within such 15-day period, the Endangered Species Committee shall appoint, by a vote of a majority of the members of the Committee, one individual not later than 30 days after the end of such 15-day period.

Page 13, beginning on line 16, strike out "other Federal agencies." and insert in lieu thereof "a Federal agency."

Page 18, line 3, insert "or the permit or license applicant" after "agency".

Page 18, line 23, insert after the period the following:

Any action for review under this subsection shall receive preference over other matters before the court and shall be heard and determined as expeditiously as the court considers practicable.

Page 23, line 3, strike out "action;" and insert in lieu thereof "action." and closing quotation marks.

Page 23, line 18, strike out "(c)" and insert in lieu thereof "(c) Cooperative Agreements.—".

Page 28, line 9, insert "PROGRAM.—" after "(a)".

Page 28, line 16, strike out "(b)" and insert in lieu thereof "(b) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT.—".
 Page 29, after line 10, insert the following:

SEC. 11. Section 10 of the Endangered Species Act of 1973 (16 U.S.C. 1539) is amended by adding at the end thereof the following new subsection:

(h) CERTAIN ANTIQUE ARTICLES.—(1) Sections 4(d) and 9(a) do not apply to any article (other than scrimshaw) which—

(A) was made before 1830;

(B) is composed in whole or in part of any endangered species or threatened species listed under section 4;

(C) has not been repaired or modified with any part of any such species on or after the date of the enactment of this Act; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1) (A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1) (A), (B), and (C) must be entered into the customs territory of the United States.

PURPOSE OF THE LEGISLATION

The purpose of the legislation is to authorize appropriations to carry out the Endangered Species Act, and to introduce some flexibility into the Act.

To accomplish this purpose, the legislation adopts a procedure through which Federal agencies may be considered for an exemption from the Act's mandate that they not jeopardize the continued existence of any endangered or threatened species or adversely modify the critical habitat of such species.

LEGISLATIVE BACKGROUND

H.R. 13870, the predecessor bill to H.R. 14104, was introduced on August 9, 1978, by Mr. Leggett, following eight days of oversight hearings on the operation and administration of the Endangered Species Act by the Subcommittee on Fisheries and Wildlife Conservation and the Environment. H.R. 13807 was considered by the subcommittee in open markup sessions on August 21, 22, and 23, and September 11 and 13. On September 13, 1978, the subcommittee unanimously adopted an amendment in the nature of a substitute to H.R. 13807 and

ordered the bill, as amended, reported to the Full Committee in the form of the clean bill, H.R. 14104.

H.R. 14104 was introduced on September 18, 1978 by Mr. Leggett and cosponsored by Mr. Murphy of New York, Mr. Dingell, Mr. Ruppe, Mr. Forsythe, Mr. Bowen, Mr. Oberstar, Mr. de la Garza, Mr. Young of Alaska, Mr. AuCoin, Mr. Emery, Mr. Hughes, Mr. Akaka, Mr. Dornan, Mr. Evans of Delaware, Mr. Tribble and Mr. Rooney.

The Committee considered H.R. 14104 in open markup session on September 19 and unanimously ordered the bill reported to the House with amendments.

H.R. 14104, in addition to a number of other provisions, authorizes appropriations to the Departments of the Interior and Commerce to carry out the Endangered Species Act through Fiscal Year 1981. To that extent the bill is identical to H.R. 10883 reported to the House by the Committee on March 31, 1978 in order to comply with Section 402 of the Congressional Budget Act.

Briefly explained H.R. 14104, as ordered reported to the House, would do the following:

1. Revise the notice procedures in the Act to improve public notice of proposals to list species as endangered or threatened and designate critical habitat;

2. Require public hearings in areas affected by a designation of critical habitat;

3. Establish a procedure whereby Federal agencies can receive exemptions from the requirements of the Act through a six member cabinet level committee;

4. Establish a grant-in-aid program for States which have developed an adequate and active program for the conservation of endangered and threatened plants;

5. Revise the penalty provisions of the Act by reducing the strict liability penalty for others than importers and exporters to \$500, making criminal violations of the Act a general rather than a specific intent crime, and subjecting importers and exporters of fish and wildlife and plants to strict liability penalties of up to \$10,000;

6. Provide the Secretary of Agriculture with authority to acquire land for the conservation of endangered and threatened species with Land and Water Conservation Funds;

7. Provide exceptions from the act's requirements for the progeny of legally held captive raptors and antique articles made before 1830;

8. Require a review of the endangered species list at least once every 5 years; and

9. Authorize appropriations of \$25.5 million in fiscal year 1979; \$28 million in fiscal year 1980; and \$30.5 million in fiscal year 1981 to carry out the purposes of the act.

BACKGROUND AND NEED FOR THE LEGISLATION

1. OVERVIEW OF THE ENDANGERED SPECIES ACT OF 1973

Congressional concern about rapidly deteriorating fish, wildlife and plant habitat, indiscriminate utilization of plants and animals and

Increasing numbers of species threatened with extinction resulted in a series of legislative actions culminating in the enactment of the Endangered Species Act of 1973. The act repealed the Endangered Species Conservation Act of 1969, broadened Federal responsibilities to list species and increased the Federal authorization and programs for insuring the survival of species.

The primary purpose of the Endangered Species Act of 1973 is to prevent animal and plant species endangerment and extinction caused by man's influence on ecosystems, and to return the species to the point where they are viable components of their ecosystems. The Department of the Interior estimates that there are 20 species becoming extinct per decade in the United States and an even greater number entering the endangered category. If this rate applies worldwide an estimated 300 extinctions occur per decade.

The process of extinction, of course, is a natural phenomenon. Throughout the history of the world species of animals and plants have appeared, changed and disappeared. In recent time the "extinction experience" has changed dramatically. All available evidence suggests that the rate of extinction of many species of plants and animals has increased significantly in the post-industrial era. In many cases the process of extinction has been associated with an increase in man's ability to alter natural habitats for his own devices. The loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide.

A. Listing of endangered and threatened species

The protections provided to animal and plant species threatened with extinction are activated by the listing of a species as "endangered" or "threatened." The endangered category refers to those species which are threatened with extinction through all or a significant portion of its range, while threatened species are those that are likely to become endangered within the foreseeable future. The various prohibitions provided in the Act may vary depending on whether a species is listed as "endangered" or "threatened."

Species are added to the endangered and threatened species list in two different ways. A member of the public may petition the Secretary for a listing, or the listing process may be initiated by the Department of the Interior or Commerce on the basis of the best scientific and commercial data available. If a private citizen petitions the Secretary to list a species, and presents substantial evidence in support of the petition, the Secretary is required to conduct a review of the species. Although the Department of the Interior uses a priority system to determine which of the hundreds of unlisted endangered species should be acted on first, the petitioning process interrupts the Department's priority system by requiring immediate review.

The act provides five criteria for determining whether a species is endangered or threatened. These are:

1. The present or threatened destruction, modification, or curtailment of the species habitat or range;
2. Overutilization for commercial, sporting, scientific, or educational purposes;
3. Disease or predation;

4. The inadequacy of existing regulatory mechanism; or
5. Other natural or manmade factors affecting its continued existence.

Any proposed listing, delisting, or reclassification is published in the Federal Register, and the public is given at least 60 days in which to comment. Individuals may request a public hearing on a proposed listing, but the Secretary has the discretion to deny the hearing request. The Department has held six public hearings on listing proposals, and they have denied five requests for hearings. The Director of the Fish and Wildlife Service recently announced that all future proposed designations of critical habitat would be accompanied by a hearing in the local area.

Following the review of comments and evaluation of the best available biological data the Department may publish a notice of final rule-making in the Federal Register. Regulatory proposals generally become effective 30 days after publication of the final determination in the Federal Register.

As of August 1978, the endangered and threatened species list contained 228 domestic and 457 foreign species. An additional 137 animal species and 1,850 plant species have been formally proposed for listing as endangered or threatened (See table 1).

TABLE 1

Category	Endangered and threatened species		
	United States	Foreign	Total
Mammals	34	245	279
Birds	71	144	215
Reptiles and amphibians	26	55	81
Fishes	41	10	51
Snails	7	1	8
Clams	23	2	25
Crustaceans	1	0	1
Insects	8	0	8
Plants	17	0	17
Total	228	457	685

Although most of the Department's actions under the Act have involved the listing of species, the act also authorizes the Secretary to delist or reclassify species in much the same manner as the initial listing. Certain species that closely resemble listed endangered or threatened species can also be listed under the act if the Secretary finds that the listing of the physically similar species will facilitate enforcement of the act. The ultimate goal of the Endangered Species Act is to focus sufficient attention on listed species so that, in time, they can be returned to a healthy state and removed from the list.

B. Prohibited activities

Once an animal or plant species has been listed as endangered, the act prohibits a number of activities involving the listed species unless an exception applies or a permit is granted. These prohibitions include:

1. The taking of endangered animal species;
2. The importing or exporting of listed species;

3. The selling or delivering any species which are illegally taken; or

4. The sale of listed species in interstate or foreign commerce.

These prohibitions apply to live or dead species; to their parts or products; to all progeny of animals born on or after December 28, 1973; and to animals held at that time for sale or barter.

All of these prohibitions apply automatically in the case of a species which is listed as endangered. In contrast, when a species is listed as threatened, the Secretary has the discretion to proscribe actions as he deems necessary to provide for the conservation of the species.

C. Exceptions

Although the act established a number of stringent protections for animals and plants listed as endangered, it also provided for some exceptions to the general prohibitions. These include:

1. An exemption for listed animals that were in captivity or a controlled environment on December 28, 1973, and not held in the course of a commercial activity; and

2. An exception which permits Alaskan Natives to take listed species for subsistence purposes, and which permits them to sell native handicrafts fashioned from the nonedible byproducts of listed species.

The act also authorizes the Secretary to permit acts otherwise prohibited by the statute for scientific purposes or to enhance the propagation or survival of the affected species.

D. Penalties and enforcement

The act established a three-tiered civil and criminal penalty provision for violations of the statute. Any person violating the act is subject to a maximum strict liability penalty of \$1,000. If a person knowingly violates a provision of the act he can be fined up to \$10,000 for each violation; and any person who willfully commits an act which violates the statute can be fined up to \$20,000 or imprisoned up to one year.

In addition the civil and criminal penalty provisions provided already discussed, the act authorizes any person, private entity, as well as any State or Federal agency to bring suit to enjoin violations of the act.

II. SECTION 7 AND CRITICAL HABITAT

Section 7 of the Endangered Species Act requires Federal agencies to insure that any action authorized, funded or carried out by them does not jeopardize the continued existence of listed species or destroy or modify the critical habitat of any endangered or threatened species. This one small section has developed into one of the most significant portions of the entire statute.

The mandate of section 7 applies once a species is listed or once "critical habitat" is designated for any listed species. The term "critical habitat" was not defined in the 1973 act, but regulations promul-

gated pursuant to the act have defined it to include "[a]ir, land or water areas ... the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population...."

The designation of critical habitat for listed species occurs in much the same manner as the initial listing of the species as endangered or threatened. Although the Departments did not originally designate critical habitat concurrently with the listing they are not attempting to do so. As of August 1978, critical habitats had been designated for 32 separate species. The species involved and the area of the habitat are described in tables 2 and 3. An additional 56 critical habitats have been formally proposed for designation.

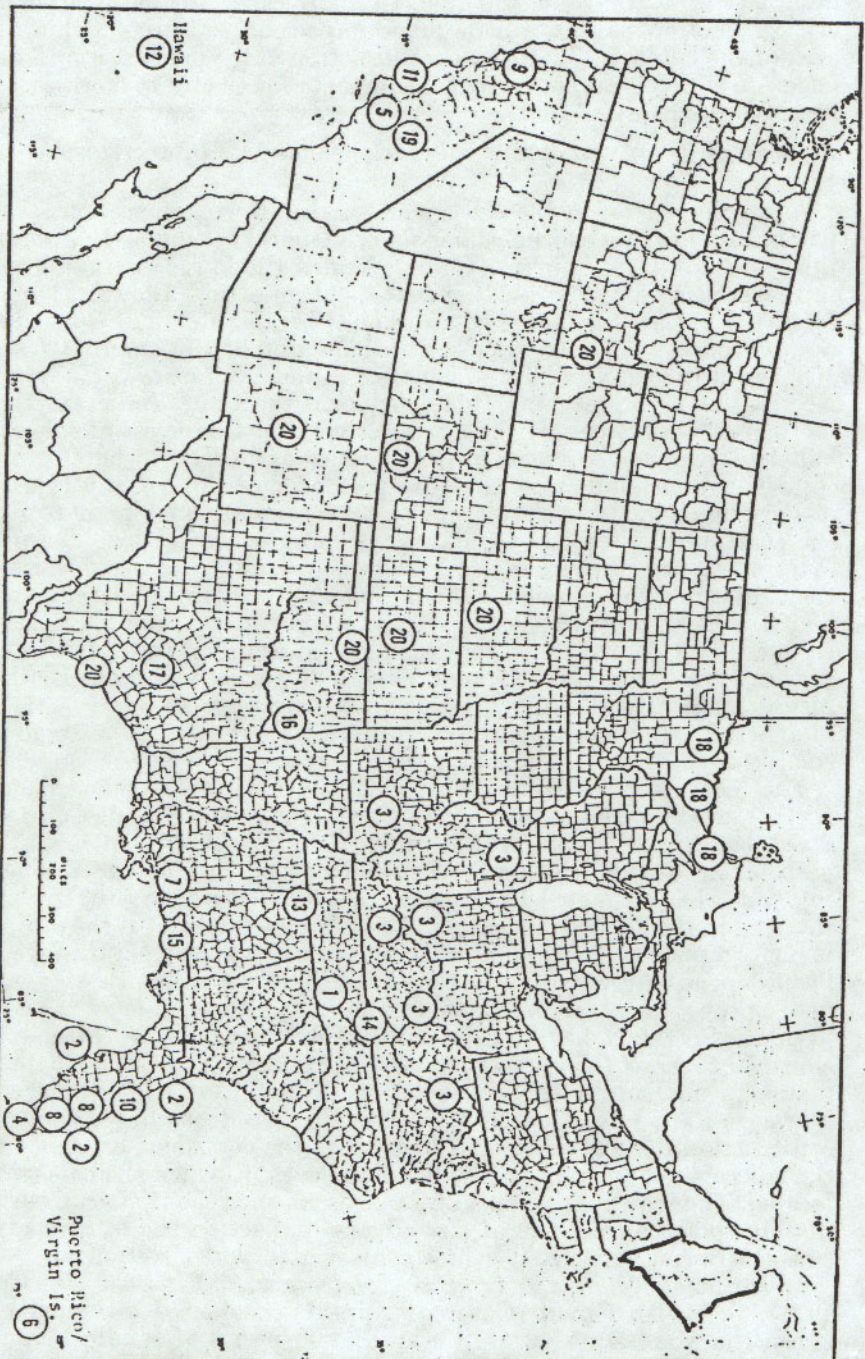
TABLE 2.—CRITICAL HABITAT FINALIZED, MAPS, AND DESCRIPTIONS

Species	Date of Federal Register	Estimated total acres (10 ³)	Number of areas	Notes	Map index location
Snail darter (no map available)	Apr. 1, 1976	1.3	1		1.
Florida manatee (no map available)	Sept. 24, 1978	950	16		2, 4, 10.
Indian bat (no map available)	Sept. 24, 1976	NA	13	2	3, 1.
American crocodile	do.	960	1		4.
California condor (no map available)	do.	556	9		5, 19.
Yellow-shouldered blackbird	Nov. 19, 1976	22	1	3	6.
St. Croix lizard	June 3, 1977	.015	1		6.
Giant anole	July 21, 1977	1.6	1		6.
Mississippi sandhill crane	Aug. 8, 1977	25	3		7.
Everglade kite	Aug. 11, 1977	963	9		8.
American peregrine falcon	do.	12	5		9.
Cape Sable seaside sparrow	do.	271	4		4.
Dusky seaside sparrow	do.	90	2		10.
Morro Bay kangaroo rat	do.	8	1		11.
Palila	do.	77	1		12.
Alabama cavefish (no map available)	Sept. 9, 1977	NA	1	2	13.
Slackwater darter	do.	20	2		13.
Slender chub	do.	22	2		14.
Spottfin chub	do.	186	3		1.
Yellowfin madtom	do.	30	2		14.
Florida Pine Barrens treefrog	Nov. 11, 1977	1.1	6		15.
Golden coqui	do.	7.5	3		6.
Leopard darter	Jan. 27, 1978	8.0	3	4	16.
Houston toad	Jan. 31, 1978	83	2		17.
Mona boa	Feb. 3, 1978	22	1	3	6.
Mona ground iguana	do.	22	1	3	6.
Gray wolf	Mar. 9, 1978	4,600	4		18.
Little Kern golden trout	Apr. 13, 1978	36	1		19.
Whooping crane	May 15, 1978	365	9		20.
Contra costa wallflower	Aug. 31, 1978	.300	1		
Antioch Dunes evening primrose	do.	0.03	1		
New Mexican ridgenose rattlesnake	do.	1,000			
Total		9,392	110		

Notes:

1. Estimate subject to 30-percent error, either direction.
2. Caves, no estimate made of area.
3. (Mona Island, P.R.) all 3 species have same critical habitat.
4. Actual critical habitat is described as river or stream course, no actual area stated (estimated river miles converted to acres).

TABLE 3



As the Act is currently written, critical habitat is determined solely on the basis of biological factors. The Secretary has no discretion to alter a critical habitat designation on the basis of the effect that such designation may have on the area. In many cases, the designation of critical habitat may have little or no impact on activities within the area of the habitat. Whether a specific action may violate section 7 depends on a biological analysis of the impact of the activity on the listed species or its habitat.

A. Tellico Dam and the snail darter—judicial interpretations of section 7

As we have seen in the celebrated snail darter case, section 7 can potentially have an enormous impact on Federal activities. In June of this year, the U.S. Supreme Court affirmed the lower court decision in the Tellico Dam case holding that the Tennessee Valley Authority facility could not be completed as planned because it would jeopardize the existence and destroy the critical habitat of the snail darter, a member of the perch family (*Tennessee Valley Authority v. Hill et al.*, No. 76-1701). In reaching this conclusion the Court indicated that the legislative history of the act revealed that Congress intended to halt and reverse the trend toward species extinction—whatever the cost. The Court indicated that the pointed omission of any type of qualifying language in the statute revealed congressional intent to give the continued existence of endangered species priority over the primary missions of Federal agencies. The Supreme Court also dismissed the arguments that section 7 should not apply to any Federal action which is at an advanced stage of construction at the time the species is listed. The Court argued that the plain meaning of the language of section 7, read against the stated policies of the act and its legislative history, indicated that Congress did not intend agencies to be able to escape the mandate of section 7 simply on the basis of the stage of completion of the affected project or activity.

The Tennessee Valley Authority (TVA) has not conducted any further work on the Tellico Project since the Sixth Circuit Court of Appeals decision in January. Through February 1977 TVA had obligated about \$103 million on the Tellico project. The General Accounting Office has estimated that about \$56.3 million of the \$103 million invested in the Tellico project could provide some benefit if the project is not completed. The amount of benefit to be derived from the investment depends largely on the ultimate case, however, and probably will not be proportionate with the original cost.

In all, Section 7 has been interpreted by the courts on three occasions. In *Sierra Club v. Froehke*, 534 F. 2d 1289 (8th Cir. 1976), the plaintiffs challenged the construction of the Corps of Engineers' Meramec Park Lake Dam in Missouri. The plaintiffs alleged that the construction of the dam would jeopardize the continued existence of the endangered Indiana bat by flooding caves in which the bats were located. The 8th Circuit Court of Appeals affirmed the District Court's finding that the existence of any adverse impact on the bats was insufficiently conclusive to preclude construction under section 7.

In *National Wildlife Federation v. Coleman*, 529 F. 2d 359 (5th Cir. 1976), the Fifth Circuit Court of Appeals considered a conflict between the Mississippi sandhill crane, a subspecies of sandhill crane, and a planned interchange for Interstate Highway 10. The Court of

Appeals enjoined the Department of Transportation from proceeding with the planned construction of the interchange until the Department could ensure that the development of adjoining lands would not be detrimental to the continued survival of the cranes and the preservation of their habitat. Subsequent to this ruling, the parties to the action agreed that the Interchange could be built if the Department would purchase the land adjacent to the interchange. The completion of the interchange has been stalled, however, as a result of the dispute between the Departments of the Interior and Transportation as to who would be responsible for acquiring the land around the interchange.

Both the Indiana bat and the sandhill crane cases illustrate the fact that there is some degree of flexibility in Section 7. In the sandhill crane case the plaintiffs did not seek, and the court did not enjoin the completion of the highway despite the fact that it bisected the sandhill crane's habitat. In the Indiana bat case the court found that the impact of the impoundment on the bats and their habitat was not sufficiently severe to amount to a violation of Section 7. The determination of whether a particular activity violates Section 7 depends on the type and degree of impact that the activity will have on the species or its habitat. These cases also make it clear, however, that the determination of whether a particular activity violates section 7 is made irrespective of the economic importance of the activity.

B. Section 7 and the consultation process

In addition to requiring Federal agencies to ensure that their actions do not adversely impact endangered species, the section also requires all federal agencies to consult with the Department of the Interior (Department of Commerce in the case of marine species) when any of their actions may affect endangered species. This consultation process is central to the resolution of conflicts under the Act.

Typically the consultation process will be initiated by a Federal agency when it discovers that it may be taking an action that will have an impact on an endangered species. The agency contacts the Fish and Wildlife Service or the National Marine Fisheries Service, depending on the species involved, and requests assistance to determine whether there is a potential violation of section 7. The Service initially conducts a threshold examination in an attempt to determine that nature of any impact on a listed species. At the conclusion of the threshold examination the Service issues a biological opinion indicating whether the action is likely to jeopardize the species or adversely modify the critical habitat, and suggesting possible modification which would avoid any adverse impact.

Although section 7 has been in effect since 1973, this consultation procedure was not formally instituted until January of this year. The administration has testified that some 4500 consultations have been conducted under Section 7 since 1973. Unfortunately, until recently the Department of the Interior did not attempt to make a formal record of these consultations and the Committee has been unable to substantiate the number of successful consultations under the Act. It is assumed that a large number of the consultations amounted to informal contacts between the Federal agency and the Fish and Wildlife Service. The Department of the Interior estimates

1979. In the future the Department should keep accurate records on each consultation on file regardless of whether consultation amounts to only a single inquiry such as a telephone call.

The evidence presented to the Committee suggests that in many instances good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts. As an example, consultation between the Service and the Corps of Engineers on the proposed Dickey-Lincoln project in Maine appears to have resolved any potential conflict between the reservoir and the endangered furbish lousewort. In that case the Service recommended a conservation program to the Corps of Engineers which included acquisition and protection of existing habitats below the project impoundment area, acquisition of new habitats for relocated populations, and the development of a monitoring program capable of detecting any changes in the lousewort's biological status. The consultation involving the furbish lousewort was one of the most complex conducted by the Fish and Wildlife Service. Some consultations may amount to no more than a simple inquiry whether a listed species is present in a project area.

Any determination by the Fish and Wildlife Service that the activity may jeopardize the continued existence of listed species does not necessarily mandate any particular action by the acting agency. The section 7 regulations make it clear that it is the responsibility of the acting agency to determine whether to proceed with the activity or program as planned in light of its Section 7 obligations. The judicial decisions interpreting Section 7 indicate, however, that the biological opinion issued by the Fish and Wildlife Service will ordinarily be given great weight by the courts. Federal agencies proceeding with an action in the face of an adverse biological opinion will be doing so at their peril.

Although consultation can be a valuable tool for resolving conflicts between endangered species and Federally authorized activities, the committee is concerned that the volume of consultations expected under section 7 may ultimately overwhelm the Fish and Wildlife Service. The committee is especially alarmed that, because additional full-time personnel ceilings have not been provided by the Administration, many of these all-important consultations will be performed by part-time personnel. The efficient operation of the Department's consultation teams is vital if future conflicts between endangered species and Federal development projects are to be avoided. The committee does not believe that part-time personnel can adequately perform the difficult task of consulting with other Federal agencies on projects which may result in species or habitat degradation.

III. THE POTENTIAL FOR FUTURE ENDANGERED SPECIES CONFLICTS

Before determining the need for any amendment to the Endangered Species Act, the Subcommittee on Fisheries and Wildlife Conservation and the Environment conducted the most extensive set of oversight hearings ever held on the operation of the Endangered Species Act. These hearings attempted to determine the nature and extent of current conflicts under the act, and the likelihood of future conflicts between listed species and federally authorized activities.

The evidence developed at these hearings suggests that the consultation process can resolve many if not most of the conflicts that might develop under the Act. The committee believes that the popular press has grossly exaggerated the potential for conflict under the Act. It is clear, nevertheless, that there will continue to be some Federally authorized activities which cannot be modified in a manner which will avoid a conflict with a listed species. For example, the Tennessee Valley Authority Columbia Dam project appears to pose a serious threat to several listed species. The likelihood of future conflicts will increase as more species are added to the Endangered Species List and as more critical habitats are designated for listed species. As we have already mentioned, there are currently 137 animals and 1850 plants proposed for listing as endangered and threatened and 56 critical habitats proposed for designation. The Department of the Interior anticipates listing some 414 domestic species and designating 293 critical habitats before 1980.

Numbers alone, nevertheless, can never tell the entire endangered species story. Many of the plant species, for example, are located in isolated areas of California and Hawaii. It is very unlikely that the listing of these plant species will precipitate conflicts with Federal activities. If a conflict develops, it will be a simple matter to relocate populations of these species to avoid a violation of section 7. On the other hand, the amount of biological information about any particular endangered species can be very limited. And as a result, it may be quite difficult for the Fish and Wildlife Service to know with any certainty at the consultation stage whether an activity will "jeopardize the existence" of a particular species.

All of these facts, considered together, convinced the committee that some flexibility is needed in the act to allow consideration of those cases where a Federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of Section 7. The committee believes that an amendment of the Act is further justified in light of allegations by the General Accounting Office that the Fish and Wildlife Service has deliberately refrained from listing two species of insects which appear to pose a serious conflict with the New Melones Dam in California. The Fish and Wildlife Service has allegedly omitted these species from the list for fear of provoking the Congress into major revisions of the Endangered Species Act.

The committee considers these allegations to be extremely serious. Those individuals charged with the administration of the act do not have the legal authority to weigh the political importance of an endangered species. The fact that the very administrators of the act have apparently determined that the act is insufficiently flexible is evidence itself of the necessity for amendment.

IV. H.R. 14140—GENERAL DISCUSSION

A. Compromise

The Endangered Species Act amendments were subjected to a vigorous debate in both the Subcommittee and full committee. At one point, no less than five separate amendment proposals were considered by the committee in its markup session. H.R. 14104 represents a compromise

between these disparate points of view. The bill attempts to retain the basic integrity of the Endangered Species Act, while introducing some flexibility which will permit exemptions from the Act's stringent requirements. At the same time, the legislation aims to improve the listing process and the public notice process of proposed listing and designations. These improvements will insure that all listing and designations are made by the Department of the Interior only after a thorough survey of all of the available data, and only after notice to the local communities that will be most affected by any listing or designation. In addition, the compromise amendment contains provisions allowing for the enhancement of existing critical habitat of endangered and threatened species.

B. Exemption procedure

H.R. 14104 would establish a procedure through which Federal activities could be exempted from the requirements of section 7 of the act. The exemption procedure could be initiated once the Secretary issues a biological opinion indicating that the agency action may jeopardize the continued existence of a listed species or adversely modify its critical habitat. The application would initially be considered by a three member review board which would make recommendations to a six member cabinet level committee. The procedure outlined here is very similar to that regularly utilized by Federal agencies under the terms of the Administrative Procedure Act. In this case, the review board would be acting in much the same capacity as an administrative hearing examiner who makes recommendations to a Federal agency on a pending regulatory proposal.

The review board would be composed of an appointee of the Secretary of the Interior (the Secretary of Commerce in the case of marine species), an appointee of the Governor of the affected State, and an individual appointed by the two appointees.

Before proceeding to review the merits of granting an exemption for the agency action, the review board would be required to make an initial determination that the agency has made a good faith effort to consult with the Fish and Wildlife Service and attempt to resolve the conflict with the endangered species. This step is crucial in order to insure that all Federal agencies fully comply with the consultation requirements of section 7.

Once the review board determined that the agency had consulted in good faith, it could proceed to consider the merits of the application. The review board would determine, on the basis of the evidence presented at a formal adjudicatory hearing, whether—

A. There are no feasible and prudent alternatives to the agency action;

B. The benefits of the agency action clearly outweigh the benefits of alternative courses of action consistent with the conservation of the species; and

C. The action is of national or regional significance.

At the conclusion of the formal hearing the review board would forward its recommendation, including a recommendation of the necessary mitigation and enhancement measures to be taken, to the Endangered Species Committee composed of the following members:

1. The Secretary of Agriculture;
2. The Secretary of the Army;

3. The Secretary of the Interior;
4. The Administrator of the National Oceanic and Atmospheric Administration;
5. The Chairman of the Council on Environmental Quality; and
6. The Governor of the State in which the agency action will occur.

The Endangered Species Committee would review the recommendations of the review board and the evidence on which it is based and would decide whether or not to grant an exemption from section 7 of the act. Four out of the six committee members would have to vote for an exemption in order for an exemption to be granted. If such an exemption is granted, the committee would be required to establish the necessary mitigation and enhancement measures.

The Committee on Merchant Marine and Fisheries adopted the exemption procedure with the firm belief that it offers the best potential for fairly evaluating and balancing the benefits of the agency action against the benefits of alternatives which will insure the conservation of the species. The membership of the Endangered Species Committee has been deliberately structured to take advantage of a broad array of experience and expertise and to balance all possible points of view.

The committee would like to point out, in response to the additional views of several members of the Committee, that the review board does not duplicate the duties of the Endangered Species Committee. The review board merely makes recommendations to the Endangered Species Committee. In this sense, the review board will be acting as a hearing examiner for the committee. Even if the bill did not include a review board, the committee would undoubtedly have to hire a hearing examiner to conduct the Federal adjudicatory hearing. The exemption procedure provided in H.R. 14104 will assure that all of the evidence will be reviewed by highly competent and professional appointees of the Secretary and Governor.

Although the exemption procedures involve a two-step process, the bill includes specific timetables to insure that an exemption application will receive immediate consideration. The review board is required to complete its hearings and make its recommendation within 180 days. The committee in turn is required to decide whether to grant an exemption within 90 days of receiving the recommendation of the review board.

C. Amendments to the listing process

H.R. 14104 includes several amendments to the endangered species listing process. These amendments were added to the legislation in order to correct a number of deficiencies that were highlighted in the course of the oversight hearings. The committee discovered that, all too often, the listing of a species or the designation of critical habitat occurs in a regulatory vacuum. There has been little or no effort made to publicize the regulatory proposal in the affected area or give the people most directly impacted by the proposed regulation an opportunity to effectively comment on it. Under the existing Act an individual would have to spot the regulatory proposal in the Federal Register in order to be aware of any potential listing or designation of habitat in his area.

The committee believes that the listing of a species or the designation of critical habitat is important enough to require the administering agencies to expand their notice procedures. H.R. 14104 would alleviate this problem by requiring actual notice of regulatory proposals to general units of government. In addition, the bill requires that any proposed designation of critical habitat be published in a local newspaper in the affected area. Finally, the bill would require informal public meetings on proposed critical habitat designations in the area of the habitat and more formalized hearings in the State. Added together, these provisions will insure that the Department of the Interior is not listing species and designating critical habitat without consulting the views of the people of the affected area. In addition, these provisions will serve to alert the Fish and Wildlife Service to possible conflicts between listed species and human activities. The committee believes that it is in everybody's interest for conflicts between the presence of endangered species and development activities to be discovered and resolved at the earliest possible opportunity.

D. Evaluation of economic impact of the designation of critical habitat for invertebrates

The ultimate goal of the Endangered Species Act is the conservation of the ecosystem on which all species, whether endangered or not, depend for survival. For this reason the Endangered Species Act protects all endangered and threatened members of the animal kingdom, not merely the so-called higher forms of life. Nevertheless, the committee recognizes that the large number of species and subspecies within the 21 nonvertebrate phyla could ultimately present serious conflicts with many Federal activities. The committee adopted a provision, which while continuing full protection for all listed species, does give the Secretary the discretion to alter a critical habitat designation for an invertebrate species if he determines that the economic benefits of excluding a portion of the critical habitat outweigh the benefits of designating the area as part of the critical habitat.

This provision is not intended to downgrade the status of invertebrate species. Rather, it is intended to avoid conflicts between invertebrate species and Federal activities at an early stage, without having to resort to the full exemption procedure.

SECTION-BY-SECTION ANALYSIS

Section 1 of H.R. 14104 contains the short title and enacting clause.

Section 2 of H.R. 14104 contains amendments to section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533).

Section 4(a) (1) of the Endangered Species Act of 1973 requires that the listing of any species as threatened or endangered is to be carried out by regulation published in the Federal Register. Paragraph 1 of section 2 of the bill has the additional requirement that the Secretary "to the maximum extent prudent" specify critical habitat at the same time as he publishes a regulation listing a species. The phrase "to the maximum extent prudent" is intended to give the Secretary the discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so.

As an example, the designation of critical habitat for some endangered plants may only encourage individuals to collect these plants to the species ultimate detriment. The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.

Section 4(b) of the act is amended by the addition of a new paragraph which specifies the way in which the critical habitat of invertebrate animal species is to be determined by the Secretary. In the new paragraph, the Secretary is directed to consider the economic and other relevant impacts of the inclusion of areas within a proposed critical habitat. The Secretary may exclude any area from a proposed critical habitat if he determines that the benefits of such an exclusion outweigh the benefits of specifying the area as part of the critical habitat.

Up until this time, the determination of critical habitat has been a purely biological question. With the addition of this new paragraph, the determination of critical habitat for invertebrate takes on significant added dimensions. Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. The Secretary is not required to give economics or any other "relevant impact" predominant consideration in his specification of critical habitat for invertebrates. The consideration and weight given to any particular impact is completely within the Secretary's discretion.

In directly addressing the question of the specification of critical habitat for invertebrates, the committee was motivated by its knowledge of the large number of species and subspecies of invertebrates, their usually high rate of reproduction, and their relatively small critical habitat requirements. The result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. The committee expects that in some situations, the resultant critical habitat will be different from that which would have been established using solely biological criteria. In some situations, no critical habitat would be specified. In such situations, the act would still be in force to prevent any taking or other prohibited act described in 16 U.S.C. 1538. In addition, agencies would still be prohibited from taking an action which would jeopardize the existence of the invertebrate species.

The committee amended H.R. 14104 to require a review of the Endangered and Threatened Species List at least once every 5 years. On the basis of this review, the Secretary would determine whether to: (1) remove any species from the list; (2) change the status of any listed species from endangered to threatened or threatened to endangered. Any determinations made pursuant to this review must be made in accordance with the criteria described in section 4(a) of the act and pursuant to the listing procedure described in section 4(b). The com-

mittee anticipates that the Secretary may decide to conduct the required review in increments. Any failure to review all of the species on the list would not invalidate the listing of any species.

Section 2 of H.R. 14104 also amends section 4(c) (1) of the act which presently requires the Secretary to publish a list of endangered or threatened species which also specifies the portion of its range in which the species is endangered or threatened.

The committee bill would amend section 4(c) (1) to require the Secretary to include critical habitat designations on the Endangered and Threatened Species List. The term "range" is used in the general sense, and refers to the historical range of the species. The committee believes, nonetheless, that the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species.

H.R. 14104 amends section 4(f) (2) (A) of the act to expand present notice requirements and to require public meetings or hearings in connection with the listing of a species and the specification of its critical habitat.

Under the committee bill, notice of a proposed regulation (including a complete text of the regulation) would have to be published in the Federal Register 60 days before its effective date. Where critical habitat is specified, such notice must also be published in a newspaper of general circulation within or adjacent to such habitat. Actual notice of the regulation and any environmental assessment or environmental impact statement prepared on it is required to be given to all general local governments within or adjacent to the proposed critical habitat at least 60 days prior to its effective date. This provision does not require actual notice to special districts such as an irrigation or school district. The committee expects that the Secretary would utilize OMB Circular A-95 or some similar device for assuring effective notice to local governments.

Where critical habitat is specified in the proposed regulation, the Secretary must promptly hold a public meeting on the proposed regulation. The meeting must be held in the area in each State where such habitat would be found. The committee intends that the meetings held pursuant to this paragraph be of an informal variety that would permit a colloquy between representatives of the Department and local citizens. If a timely request is filed with the Secretary, a public hearing must be held in the State whose citizen filed the request. It is the intent of the committee that such hearings be held in accordance with appropriate sections of the Administrative Procedures Act and near or within the proposed critical habitat. The committee does not intend that either the meetings or hearings be full adversarial proceedings with all of its inherent expenses to the parties and delays in arriving at a final regulation.

In the rather rare instances where no critical habitat is proposed concurrently with the listing, a public meeting is to be held by the Secretary if a request therefore is filed within 45 days of the publication of general notice.

If, by chance, actual notice is not given to some unit of general local government, such an unintentional and unplanned failure of the notification system shall not invalidate the proposed regulation.

H.R. 14104 adds a new paragraph (5) to section 4(f) which would provide that any final regulation adding a species to the list must be published within 2 years after the notice of proposed rulemaking. Any proposed listings not finalized within 2 years must be withdrawn, and cannot again be proposed unless Secretary determines that new information is available which warrants such action. The paragraph provides that any listing which is proposed at the time of the enactment of these amendments would not have to be withdrawn until one year after the date of enactment.

The bill adds a new subsection (g) to section 4 which would require the Secretary to develop and implement recovery plans for listed species. Such plans would be designed to ensure the conservation or survival of each listed species. Recovery teams may be appointed by the Secretary, where appropriate, to aid in developing or implementing a recovery plan for a particular species. Such plans shall be as long and as detailed as is necessary and consonant with their purpose of providing a framework for actions directed at conserving or, at least, insuring the survival of the subject species. Although recovery plans are implicit in the Endangered Species Act, the Act does not specifically mandate recovery plans. As a result, recovery plans have been given a low priority within the Endangered Species Act budget.

The committee intends the Secretary to establish recovery teams to assist with: (1) the development of plans; (2) periodic amendment of plans; and (3) the implementation of the plans. The committee hopes that the Secretary will appoint full-time professionals to insure that planning and implementation proceed expeditiously.

Section 3 of H.R. 14104 contains extensive amendments to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536).

As under the present law, the Secretary is required to make sure that all the programs administered by him are in concert with the purposes of the Endangered Species Act. Each Federal agency is directed to consult with the Secretary and to use its authorities to further the purposes of the Endangered Species Act by carrying out conservation programs for listed species.

Under H.R. 14104, each Federal agency is required to insure that any action authorized, funded or carried out by it does not result in species or habitat degradation unless the action has been exempted under later provisions of the bill. In setting about to insure that its actions will not result in species or habitat degradation, each agency is expected to make use of all available expertise both within its own organization and by consulting with the Secretary, the Smithsonian Institution, the Marine Mammal Commission, or other qualified groups or individuals.

Section 7(c)(1) requires that Federal agencies insure that their actions do not result in: (1) jeopardy to the continued existence of an endangered or threatened species; or (2) the destruction or adverse modification of any critical habitat of any such species. It is the responsibility of each agency to review its activities or programs to identify any such activity or program that may affect listed species or their habitat. If a Federal agency determines that its activities or programs may affect listed species or their habitat, the agency should request assistance from the Secretary.

1. Section 7(c) (2) defines the consultation process. If the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken. The consultation will assist in the development of alternatives to the proposed action, and will result in a written biological opinion by the Secretary detailing whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat. The biological opinion will also discuss the alternatives and modifications to the proposed action which would avoid the impacts to the listed species or their habitats.

The search for alternatives in the consultation process should be limited to those that are "reasonable and prudent." The committee does not intend that the Secretary and the Federal agency should, at the consultation stage, be required to review all possible alternatives to the agency action including those inconsistent with the project's objectives and outside of the Federal agency's jurisdiction. It is the intent of the Committee that the consultation process be completed within 90 days or such time as is mutually agreed upon by the Secretary and the Federal agency.

The new Section 7(c) (3) is designed to stimulate the development of additional biological information to assist Federal agencies in complying with section 7.

It requires Federal agencies, with respect to actions for which no contract for construction has been entered into and no construction has begun on the date of enactment of this provision, to ask the Secretary whether any listed species is present in the area of any such proposed action. In responding, the Secretary is to rely on the best scientific and commercial data available. The end which this notification process is designed to accomplish is the early discovery of and elucidation of any conflicts between an agency action and a listed species.

After being notified that listed species may be present, the Federal agency is required to conduct a biological assessment. The assessment should concentrate on determining whether or not any listed species presence is likely to be adversely affected by the agency action. No contract for construction may be entered into nor may construction begin while the biological assessment process is under way. The assessment may be prepared in conjunction with the NEPA process. It is the intent of the committee that this review process take place well before the exercise of agency discretion which would result in contracts for construction, actual construction activities, or other potentially destructive activity.

The committee notes that some biological assessments may harass or harm listed species to the extent that a permit would be required to conduct the assessment. If that is the case, the Federal agency would be required to apply to the Secretary for a permit under the provisions of the Act.

The new section 7(c) (4) of the act would further strengthen the consultation process. It prohibits any Federal agency from making any irreversible or ir retrievable commitment of resources once consultation has been initiated if such commitment would have the effect of foreclosing efforts to avoid the adverse impacts on the species or their critical habitat.

H.R. 14104 includes a new section 7(d) detailing the creation of a review board and setting forth the manner in which applications for a project exemption are to be processed.

The exemption process is begun by the filing of an application with the Secretary by either the Federal agency, the Governor of the State in which the agency action will occur, or an applicant for a permit or license required under Federal law. The reference to States in which the agency action will occur is intended to apply to those States where the project, species and critical habitat are located. It is not intended to include States whose only nexus to the agency action is the issuance of a Federal permit, license or grant. An application may only be filed if, after consultation, it is the Secretary's opinion that the agency action may result in species or habitat degradation. The application must be filed within 90 days after completion of the consultation process. The application must contain a statement detailing the reasons why the agency action is qualified for an exemption.

Upon receipt of the application for exemption, the Secretary must promptly notify the Governor or Governors of any State(s) in which the agency action is being carried out and request their appointment of a member of the review board. The committee intends the Secretary to have sole discretion to determine which States are affected by the Endangered Species Act conflict and which Governors should be notified under this provision.

The review board is to consist of three members. One is appointed by the Governor or Governors, one by the Secretary, and the third is selected by the first two within 15 days of the appointment of the second. If the two appointees are unable to agree on a third member, the Endangered Species Committee is directed to select the third member.

Within 60 days of receiving the application, the Secretary is to submit to the review board his written views on the matter and his recommendations as to the final disposition of the matter.

The review board is given 60 days after the appointment of its third member to make its initial determinations. A longer period of time may be taken if agreed to between the Secretary and the agency. The board acts by majority vote in determining whether the Federal agency has met three requirements which are preconditions to further action on the exemption application. First, there must be a determination that the agency has consulted with the Secretary in good faith and has made a reasonable and responsible effort to consider modifications or alternatives which would avoid species or habitat degradation. Secondly, the agency must have conducted a biological assessment if one is required under new section 7(c) (3). Thirdly, the agency must have made no irreversible or irretrievable commitment of resources as prohibited under section 7(c) (4).

If the review board makes a positive determination on these three matters, it may proceed to conduct a hearing and forward a recommendation on the matter of whether or not an exemption should be granted. A recommendation favoring an exemption may be made to the Endangered Species Committee if a majority of the review board finds, after conducting a formal adjudicatory hearing, that: (1) there are no "feasible and prudent" alternatives to the agency action; (2)

the benefits of the agency action clearly outweigh the benefits of alternative course of action consistent with conserving the species or its critical habitat, and that such action is in the public interest; and (3) the action is of national or regional significance.

The terms "feasible and prudent" alternatives are intended to insure that the review board evaluates a wide variety of alternatives to the agency action before recommending an exemption from the act. During the consultation process, the Secretary and the Federal agency are required to evaluate a narrower range of possible alternatives to the proposed action. The committee believes that the search for alternatives before the review board should be significantly larger than during the consultation stage. Section 7 consultation is intended to focus attention on the agency action, its objectives, and the aspects of the agency action which gave rise to the problem initially. The focus of a section 7 consultation should be on solving the problem in a way which is clearly within the jurisdiction and expertise of the consulting parties.

In contrast, the review board and the Endangered Species Committee should focus on a wider variety of alternatives. Their search should not be limited to original project objectives or the acting agency's jurisdiction. The Committee does intend that the review board should only consider alternatives which are both technically capable of being constructed and prudent to implement.

The second criteria considered by the review board involves an evaluation of the benefits of the agency action and an evaluation of the benefits associated with alternatives which would avoid an adverse impact on the species or its habitat.

In the context of this provision, the committee intends that the term "benefits" shall include, but not be limited to, ecological and economic considerations. Among the economic criteria which may be examined and considered by the review board and the Endangered Species Committee are those set forth in OMB Circular A-107 and in Executive Order 11949. These include:

- (1) the cost impact on consumers, business markets, Federal, State, and local governments;
- (2) the effect on productivity of wage earners, businesses and government;
- (3) the effect on competition;
- (4) the effect on supplies of important materials, products, and services;
- (5) the effect on employment; and
- (6) the effect on energy supply and demand.

The Committee does not intend, however, that the review board and Endangered Species Committee evaluation should be limited to these criteria. They should also consider the national interest, including actions authorized, funded or carried out by the Secretary of Defense; the esthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species; and any other factors deemed relevant.

The committee notes that the amendment requires the review board and the committee to balance the benefits associated with the agency action against the benefits associated with alternative courses of action.

They should not balance the benefits of the action against the value associated with the listed species.

To be "in the public interest," an agency action must affect some interest, right or duty of the community at large in a way which they would perceive as positive.

The third finding required before the board may recommend that an exemption be granted is that the agency action be of "national or regional significance." The term "regional significance" is not intended to refer merely to projects which affect more than one State. Rather, the committee believes that the review board and the Endangered Species Committee should evaluate the nature, as well as the scope of the project, in their determination of whether an action is nationally or regionally significant. As an example, the committee believes that an action affecting the Port of Sacramento, in California, would be regionally significant.

Unless otherwise agreed between the applicant and the Secretary, the review board has 180 days after the initiation of the hearing to submit its recommendation. The recommendation shall include the board's view on the propriety of granting an exemption as well as any reasonable mitigation and enhancement measures to be considered by the committee.

The record of the review board's proceedings is to be transmitted to the Endangered Species Committee along with the board's recommendation. The review board has the power to request on a non-reimbursable basis the assistance of agency personnel from the head of any Federal agency. This would include the power to request the services of an administrative law judge to assist in the conduct of the hearing. The review board should make maximum use of this procedure and should minimize reliance on personnel provided on a reimbursable basis by the GSA. Even if the review board procures the services of a hearing examiner, the committee intends the members of the review board to be physically present during the hearing. The committee believes that the presence of the review board during the formal hearing will assist in the development of a sound and comprehensive recommendation to the Endangered Species Committee.

The committee does not intend that either the review board or the Endangered Species Committee should be considered as Federal agencies except as provided for in the bill. The Federal Advisory Committee Act shall not be applicable to either the review boards or the Endangered Species Committee.

Section 7(e) establishes the Endangered Species Committee. The committee is to be composed of six members: The Secretary of Agriculture; the Secretary of the Army; the Secretary of the Interior; the Administrator of the National Oceanic and Atmospheric Administration; the Chairman of the Council on Environmental Quality; and the Governor or Governors of the State or States within which the agency action in question will occur.

The committee is to meet at the call of its Chairman, the Chairman of the Council on Environmental Quality. It has 90 days from the date it receives the review board's recommendation to decide whether or not to grant the agency action an exemption from new subsection 7(c)

An exemption may only be granted by four of the committee's members, voting in person, and after a determination is made on the record. The committee may base its determination on the record developed by the review board, but has the power to itself receive testimony and evidence. The committee does not expect the Endangered Species Committee to conduct a second final adjudicatory hearing. The criteria the committee is to use in making its determination are identical to those considered by the review board in making its recommendation. If the committee grants an exemption, it must require reasonable mitigation and enhancement measures be taken by the successful applicant.

The phrase "reasonable mitigation and enhancement measures" is used in several places in the legislation to describe actions which shall be taken by an applicant which receives an exemption. The required actions must be "reasonable" in their cost, likelihood of protecting the listed species, and the availability of the technology required to make them effective, and other considerations deemed relevant by the Endangered Species Committee. The explanation of the phrase in new Section 7(f)(2) makes it clear that "reasonable mitigation and enhancement measures" are those actions by the applicant which are necessary and appropriate "to minimize the adverse effects of the agency action" on the species or habitat in question. Live propagation, transplantation, and habitat acquisition and improvement are mentioned as specific examples of actions a successful applicant might be required to take.

The Committee's final determination is subject to judicial review in the district court for any district where the agency action will be located. This refers to the location of the project where the project will be carried out, and not the district where a permit or license might be issued.

The Committee may not grant an exemption if the Secretary of State gives it written certification that the granting of the exemption and the resultant agency action would violate an international treaty or other international obligation of the United States. The certification must be made within 60 days after the Committee receives the application for exemption and must be published in the Federal Register. The phrase "other international obligation" should be understood to mean a formal, legal obligation of the United States Government. This provision would apply to the Agreement on the Conservation of Polar Bears, signed November 15, 1973; the U.S.-Japan Migratory Bird Convention; as well as the recently ratified U.S.-Russian Migratory Bird Treaty.

When the Committee formally issues its order exempting an agency action, any reasonable mitigation and enhancement measures must be spelled out in the document. New section 7(h) makes it clear that such measures are to be carried out and paid for by the party receiving the exemption. In the case of a Federal agency action, the mitigation and enhancement measures required under 7(f) must be authorized by the Congress prior to implementing the action. Such measures would also have to be funded by the Congress concurrently with all other project features. The reasonable mitigation and enhancement measures required under 7(f) must actually be funded and carried out for the exemption to be effective.

The costs of the mitigation and enhancement measures are to be considered project costs for all purposes except for the computation of benefit-cost or other ratios.

Agencies receiving an exemption are required to submit annual reports to the Council on Environmental Quality describing compliance with ordered mitigation and enhancement measures.

The bill adds a new section 7(j) which would allow the President to grant an exemption for replacement and repairs on public facilities necessary to prevent recurrence of a natural disaster which resulted in a Presidential declaration of a Federal disaster area.

H.R. 14104 adds a new Section 7(k) (1) which indicates that the granting of an exemption is not a major Federal action for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if an environmental impact statement which discusses impacts on endangered or threatened species or their critical habitats has been prepared on the agency action.

The committee included section 7(k) (2) in recognition of the fact that even though a project might be exempted from the requirements of section 7, section 9 of the act would still prohibit the "taking" of any endangered animal species.

Section 4 of H.R. 14104 authorizes appropriations to the Departments of Interior and Commerce to carry out the purposes of the act through fiscal year 1981.

Section 5 of H.R. 14104 defines a number of terms used in the Endangered Species Act.

The term "critical habitat" is defined for the first time. The definition is modeled after that found in present Department of the Interior regulations. Under the present regulations, critical habitat includes air, land or water areas—the loss of which would appreciably decrease the likelihood of conserving a listed species. Under the present regulations, the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured.

In the committee's view, the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat.

Under the definition of critical habitat included in H.R. 14104, air, land or water areas would be designated critical habitat only if their loss would significantly decrease the likelihood of conserving the species in question. The committee believes that this definition narrows the scope of the term as it is defined in the existing regulations.

Section 5(2) of H.R. 14104 redefines the term "species" as it is used in the act. The existing definition of "species" in the act includes subspecies of animals and plants, taxonomic categories below subspecies in the case of animals, as well as distinct populations of animal "species." The definition included within the committee bill would exclude taxonomic categories below subspecies from the definition as well as distinct populations of invertebrates.

Section 5(4) of H.R. 14104 defines "species or habitat degradation" to include of the following effects: (1) jeopardy to the continued existence of any endangered or threatened species and/or (2) the destruction or adverse modification of any critical habitat of such species.

the relevant Federal agency, and to insuring that an adequate biological assessment has been conducted. The goals can also be met—in a more efficient manner—by giving the same functions to a single consultation examiner as suggested during committee deliberations by Congressman Dingell. This option would serve the desirable purposes of encouraging full consultation, screening the Endangered Species Committee from needless work, and streamlining the exemption mechanism in the committee bill.

The application for an exemption

The proposed new section 7(d) to the Endangered Species Act contained in section 3 of the committee bill gives the relevant Federal agency, the affected State Governor, and the particular permit or license applicant the ability to seek an exemption from the Endangered Species Act. We question the wisdom of allowing the permit or license applicant the right to request such an exemption.

Under the committee plan, a request for an exemption would set in motion a year long bureaucratic exercise involving six or seven Federal Government agencies, State and local officials, public hearings, exhaustive staff work, and the possibility of judicial review. Since there will exist a tremendous incentive for license applicants to seek an exemption, we think it reasonable to require that such a request have the support at least of the affected State Governor or the Federal agency involved.

As currently drafted, we fear that the exemption process—which was intended to handle only those very rare cases of true conflict under the act—will be flooded with cases of dubious merit. This will result in a squandering of time and resources in a manner not intended by the proponents of the compromise proposal.

Standards for an exemption

The committee bill provides that one of the criteria for an exemption is that the project is of “regional significance.” This criteria is significantly less stringent than that which was proposed in the original Dingell-Forsythe proposal—that the project is “required in the national interest”. In addition, it should be recognized that the Endangered Species Act was written to protect the national interest in preserving various species of plants and animals. One of the findings of the act specifically states that, “these (endangered) species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational and scientific value to the nation and its people.”

Although we agree that an exemption procedure should be established for very special situations, we believe that any exemption criteria should be narrowly drawn and should allow exemptions to occur only when the national interest clearly requires that this should occur.

Membership of the Endangered Species Committee

One of the changes made at the time the subcommittee agreed to the compromise was the decision to eliminate the Administrator of the Environmental Protection Agency from the exemption committee. We believe that this was an error.

Clearly, the Administrator of the EPA is qualified to serve on the committee. We see no justification for excluding his scientific and environmental expertise from committee deliberations.

ADDITIONAL VIEWS

The Merchant Marine and Fisheries Committee approved a bill which was designed primarily to assure its speedy passage on the House floor. It consists of a compromise which fully satisfies no single member of the committee, but which was approved because of the urgent need to authorize the continued enforcement of the Endangered Species Act during the coming year.

Representatives John Dingell and Edwin Forsythe deserve particular credit, we feel, for their efforts to maintain the basic integrity and strength of the original Endangered Species Act. If the committee had had more time to consider this bill, we are confident that the leadership of these two members would have produced a bill superior in many respects to the compromise product which did emerge.

The views which we express here are not meant to express opposition to, or condemnation of, the overall committee bill. They are, however, intended to suggest alternative solutions to some of the issues raised in the bill in case the compromise should be challenged on the floor, or if changes are considered in conference negotiations with the Senate.

The role of the Review Board

The committee bill requires that *both* the Review Board and the Endangered Species Committee make the following subjective policy judgments when deciding whether or not to recommend an exemption to the Endangered Species Act:

1. There are no feasible and prudent alternatives to the agency action;
2. The benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and,
3. The action is of regional or national significance.

We believe that these judgments should be made solely by the Endangered Species Committee. The requirement that a Review Board also make these determinations is duplicative, it assumes that the members of these Board will be qualified to make informed, expert judgments of this type, and it allows a political judgment to be made by a group not subject to public scrutiny. The decision to condemn a form of life to extinction should not be made by three temporary employees of the Federal Government.

Since the exemption committee is granted the final word in any case, there is no need for the review board to cover the same ground. The major function of these boards should be to screen from committee consideration those exemption applications which are obviously without merit, or which concern projects about which the original consultation process has not been satisfactorily completed.

These goals can be met by limiting the three member Review Boards to examining the efforts at consultation between the Secretary and

[AUTHORIZATION OF APPROPRIATIONS]

[SEC. 15. Except as authorized in section 6 of this Act, there are authorized to be appropriated—

[(1) not to exceed \$10,000,000 for the fiscal year ending June 30, 1976, not to exceed \$1,800,000 for the fiscal transitional period ending September 30, 1976, and not to exceed a total of \$25,000,000 for the fiscal year ending September 30, 1977 and the fiscal year ending September 30, 1978, to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act; and

[(2) not to exceed \$2,000,000 for the fiscal year ending June 30, 1976, not to exceed \$500,000 for the fiscal transitional period ending September 30, 1976, and not to exceed a total of \$5,000,000 for the fiscal year ending September 30, 1977 and the fiscal year ending September 30, 1978, to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act.]

AUTHORIZATION OF APPROPRIATIONS

SEC. 15. Except as authorized in section 6 of this Act, there are authorized to be appropriated—

(1) not to exceed \$25,000,000 for the fiscal year ending September 30, 1977, and the fiscal year ending September 30, 1978, not to exceed \$23,000,000 for the fiscal year ending September 30, 1979, not to exceed \$25,000,000 for the fiscal year ending September 30, 1980, and not to exceed \$27,000,000 for the fiscal year ending September 30, 1981, to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act; and

(2) not to exceed \$5,000,000 for the fiscal year ending September 30, 1977, and the fiscal year ending September 30, 1978, not to exceed \$2,500,000 for the fiscal year ending September 30, 1979, not to exceed \$3,000,000 for the fiscal year ending September 30, 1980, and not to exceed \$3,500,000 for the fiscal year ending September 30, 1981, to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act.

EFFECTIVE DATE

SEC. 16. This Act shall take effect on the date of its enactment.

MARINE MAMMAL PROTECTION ACT OF 1972

SEC. 17. Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972.

A. Review Board

The Review Board would be constitutionally constituted were all of its members appointed pursuant to Art. II, § 2, cl. 2, i.e., either by the President or the Secretary.*

B. The Endangered Species Committee

If voting rights were denied to the Governors of the affected States, we think that they could otherwise participate in the Committee decisions without casting doubt on those decisions. Because they hold their position by virtue of their state office, we do not believe that the formality of a Presidential "appointment" of them to the Committee would solve the constitutional problem.

Department representatives have discussed the concerns noted above with the committee staff. We will be happy to continue to work with the staff in order to obviate the problems noted.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, as amended, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic; existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973, AS AMENDED

(16 U.S.C. 1531-1543; Pub. Law 93-205)

AN ACT To provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Endangered Species Act of 1973".

TABLE OF CONTENTS

- Sec. 2. Findings, purposes, and policy.
- Sec. 3. Definitions.
- Sec. 4. Determination of endangered species and threatened species.
- Sec. 5. Land acquisition.
- Sec. 6. Cooperation with the States.
- Sec. 7. Interagency cooperation.
- Sec. 8. International cooperation.
- Sec. 9. Prohibited acts.
- Sec. 10. Exceptions.
- Sec. 11. Penalties and enforcement.
- Sec. 12. Endangered plants.
- Sec. 13. Conforming amendments.
- Sec. 14. Repealer.
- Sec. 15. Authorization of appropriations.
- Sec. 16. Effective date.
- Sec. 17. Marine Mammal Protection Act of 1972.

Amendments of 1978," as reported by the Committee on Merchant Marine and Fisheries on September 19, 1978.

This Department takes no position on the merits of this legislation, however, we would like to discuss those portions of Section 3 of the bill which provide for the establishment of a "Review Board" and an "Endangered Species Committee." In our opinion, the procedure for establishment of these bodies raises issues of a constitutional dimension. Under that section these new entities would review and act on applications for federal project exemptions under the Endangered Species Act. Specifically, in the case of an application for exemption, the Review Board, after making certain threshold determinations informally, would make findings on the record after a formal adjudicatory hearing under the Administrative Procedure Act; and these findings would serve as a basis for the board's recommendation on the exemption question. This recommendation would then be presented to the Endangered Species Committee which would make an independent determination on the exemption question in accordance with standards set forth in the amendment. The Committee's decision would be the final action in the administrative process and would be subject to judicial review. Attorneys designated by the Committee would represent the Committee in any review proceeding.

Under the bill, the adjudicatory and ancillary powers exercised by the Committee fall clearly within the category of functions which, under *Buckley v. Valeo*, 424 U.S. 1 (1976), may be exercised only by persons who have been appointed pursuant to Article II, § 2, cl. 2 of the Constitution. Five of the six members of the Committee are to be appointed in accordance with that clause, but the sixth (the Governor of the State in which the agency action in question will occur) will not be appointed in that way. Under *Buckley v. Valeo*, supra, the constitutionality of the Committee is in substantial doubt because of this infirmity in the appointment mechanism.

We have similar concerns with regard to the Review Board. Because the Board's ultimate powers are only recommendatory, it could be argued that its powers are "sufficiently removed from the administration and enforcement of public law to allow [them] to be performed by" persons not appointed pursuant to the Appointments Clause. *Id.* at 141. But under at least one interpretation of the bill, the Board would have effective power, in some cases, to take dispositive action with respect to applications, since it need not consider an application at all unless it determines that certain preliminary requirements have been met. See Subsection (d) (5). The Review Board must consider an application on the merits before the exemption question can reach the Committee. This apparent screening function plays a central role in the administrative scheme, and for this reason we believe it difficult to argue that the Review Board is not engaged in "administration and enforcement of public law." Accordingly, we think that the mechanism for appointing Board members should conform with the Appointments Clause. Under the bill, two members of the Board (the appointee of the Governor of the affected State, and the member appointed by that appointee and the appointee of the Secretary of the Interior) are not appointed in accordance with the Appointments Clause.

These infirmities could be corrected as follows:

In addition, the bill provides authorizations of \$23 million for fiscal year 1979, \$25 million for fiscal year 1980, and \$27 million for fiscal year 1981 to the U.S. Fish and Wildlife Service (USFWS) to carry out its responsibilities under the Endangered Species Act. It also authorizes the appropriation of \$2.5 million in fiscal year 1979, \$3.0 million in fiscal year 1980, and \$3.5 million in fiscal year 1981 to the Department of Commerce for the National Oceanic and Atmospheric Administration (NOAA).

5. Cost estimate:

[Fiscal years; in millions of dollars]

	Fiscal year—				
	1979	1980	1981	1982	1983
Authorization level.....	26.0	28.5	31.0		
Cost estimate.....	24.4	28.3	30.9	1.9	

Note: The costs of this bill fall within budget subfunction 303.

6. Basis of estimate: The authorization levels are those stated in the bill and are assumed to be fully appropriated. Costs are estimated by applying a 2-year outlay rate to the level of appropriation authorized for NOAA, USFWS, and the expenses of the review committees. Spendout rates for NOAA and USFWS were developed in consultation with agency staffs. It was estimated that the 2-year outlay rate for the appropriation provided for the review committees would be 60 percent the first year and 40 percent the second year.

7. Estimate comparison: None.

8. Previous CBO estimate: A cost estimate was prepared on March 22, 1978, for H.R. 10883, as ordered reported by the House Committee on Merchant Marine and Fisheries. This bill provided the same authorization as H.R. 14104 for the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. The only additional cost of H.R. 14104 is related to the higher authorization of \$500,000 for the expenses of the review boards and the Endangered Species Committee.

CBO also prepared a cost estimate on May 12, 1978, for S. 2889, as ordered reported by the Senate Committee on Environment and Public Works. This bill provided higher authorizations for fiscal years 1979, 1980, and 1981. The bill also established an Endangered Species Committee.

9. Estimate prepared by James V. Manaro.

10. Estimate approved by: C. G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

DEPARTMENTAL REPORTS

H.R. 14104 was the subject of a report from the Department of Justice. This report follows:

DEPARTMENT OF JUSTICE,
Washington, D.C., September 22, 1978.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We would like to proffer the comments of the

COMPLIANCE WITH CLAUSE 2(1)(3) OF RULE XI

With respect to the requirements of clause 2(1)(3) of Rule XI of the Rules of the House of Representatives—

(A) The Subcommittee on Fisheries and Wildlife Conservation and the Environment held eight days of oversight hearings on the Endangered Species Act during the 95th Congress.

(B) The requirements of section 308(a) of the Congressional Budget Act of 1974 are not applicable to this legislation.

(C) The Committee on Government Operations has sent no report to the Committee on Merchant Marine and Fisheries pursuant to clause 2(b)(2) of Rule X.

(D) A letter was received from the Director of the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974 in reference to H.R. 14104 and follows herewith.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 22, 1978.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 14104, the Endangered Species Act Amendments of 1978.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ROBERT A. LEVINE
(For Alice M. Rivlin, Director).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 22, 1978.

1. Bill No.: H.R. 14104.
2. Bill title: Endangered Species Act Amendments of 1978.
3. Bill status: As ordered by the House Committee on Merchant Marine and Fisheries, September 19, 1978.
4. Bill purpose: The bill establishes an Endangered Species Committee and requires the formation of review boards to examine the decisions of the Secretary of the Interior as to whether an agency's action would be hazardous to endangered species and their critical habitat area. Such a determination by the Secretary would prohibit the agency's action. Except in special cases, such as cases relating to international treaty obligations as determined by the Secretary of State or cases pertaining to disaster are as declared by the President, the Endangered Species Committee would make the final governmental decision by either approving or disapproving the agency's action. If an agency exemption is granted for pertinent reasons, any person may obtain judicial review of the decision. This bill provides an authorization of \$500,000 in each of the fiscal years 1979, 1980, and 1981 to cover the expenses of both the Committee and the review boards.

before, on, or after December 28, 1973, would also be exempted from the provisions and prohibitions of the Act.

In order to encourage breeding of raptors in captivity, the domestic captive-bred progeny of all raptors legally taken from the wild after December 28, 1973, shall be treated the same as those of raptors captured prior to enactment of the present law. This is designed to alleviate human pressures on wild raptor populations. It will also increase the genetic diversity of captive populations and further encourage domestic production of raptors for conservation, recreational, scientific and breeding purposes. When domestic captive-bred raptors are intentionally released and returned to a wild state for conservation and reintroduction purposes, such raptors are thereafter entitled to the full protection of the act.

The Secretary may require the owners of all exempted raptors to keep records and required bands or other permanent markings to distinguish them from wild birds. The records and inventories may be inspected by agents of the Secretary at reasonable times. These records, permanent markers and inventory procedures should not unnecessarily duplicate those now required under the Migratory Bird Treaty Act for special purpose permits and falconer permits. The Secretary may promulgate such reasonable regulations which allow for the use, exchange, movement, import or export of legally held raptors or their domestic captive-bred progeny.

Nothing in this amendment shall be construed as a diminution of the protection of wild populations of raptors under the act.

Section 11 of H.R. 14104 amends section 10 of the act by exempting certain antique articles other than scrimshaw from the application of sections 4(d) and 9(a) of the act. Such articles are exempt from those sections if they were made before 1830, are composed in whole or part of any listed species, have not been repaired or modified with any listed species part or product thereof prior to enactment of the Act (December 28, 1973), and enter the United States through a port specially designated by the Secretary of the Treasury.

The committee chose the 1830 date with the understanding that antique articles produced prior to this date can be readily distinguished from those made after 1830.

COST OF THE LEGISLATION

In the event the legislation is enacted into law, and the moneys authorized are fully appropriated, the committee estimates the maximum cost to the Federal Government—after comparing and analyzing the information supplied by the Government agencies and their representatives and the Congressional Budget Office—for the 3 year extension of the act would be \$26 million for fiscal year 1979; and \$28.5 million for fiscal year 1980; and \$31 million for fiscal year 1981.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1) (4) of Rule XI of the Rules of the House of Representatives, the committee estimates that the enactment of H.R. 14104 would have no significant inflationary impact on the prices and costs in the national economy.

By inserting this new phrase, the committee does not intend to modify the definitions of these terms as presently defined by the agencies or the Supreme Court in *Tennessee Valley Authority v. Hill et al.*

Section 7 of H.R. 14104 amends section 6(c) of the Act to allow the Secretary of the Interior to enter into cooperative agreements with the States for the management and conservation of listed species of plants. This amendment will permit States which develop an adequate and active program for the conservation of listed plants to receive Federal grant-in-aid in the same manner as States now receive funds for resident species of endangered and threatened fish and wildlife.

Section 8 of H.R. 14104 amends section 11 of the Act, the penalties and enforcement section. All changes to this section have been made after extensive consultation with the Department of Justice.

The amendment reduces the strict liability penalty for others than importers and exporters to \$500, makes criminal violations of the act a general rather than a specific intent crime, and subjects importers and exporters of fish and wildlife and plants to strict liability penalties of up to \$10,000.

By deleting from the civil penalty and criminal provisions of section 11 the phrase, "commits an act which violates," the committee intends only to make it clear that the act's civil and criminal sanctions apply to violations involving an omission or failure to act as well as to violations involving the commission of a prohibited act. The committee does not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act. In furtherance of this intent, the committee has reduced the standard for criminal violations from "willfully" to "knowingly".

Under the amendment provided in H.R. 14104 a tourist who unknowingly imports a listed species into the United States could not be fined more than \$500. The committee assumes that in most cases, law enforcement officials will seek the forfeiture of the item rather than impose a civil penalty. The committee emphasizes that the strict liability provision which applies to persons engaged in the business as an importer or exporter of fish, wildlife or plants does not apply to commercial fishing operations which may import fish products into the United States for purposes of human or animal consumption as a part of their business.

Section 9 of H.R. 14104 provides the Secretary and the Secretary of Agriculture with the authority to acquire land for the conservation of listed species including plants. The current act limits this authority to the Secretary of the Interior.

Section 10 of H.R. 14104 provides an exemption from the prohibitions in the act for the raptors legally held in captivity or in a controlled environment on the date of enactment of the Endangered Species Act, as well as the progeny of such raptors. Prohibitions contained in the present law to prevent commerce in endangered species have impeded captive breeding efforts by responsible falconers, conservationists, and biologists.

Unless specified in other laws, H.R. 14104 would exempt raptors held prior to the enactment of the Endangered Species Act of 1973 from the provisions and prohibitions of that act. The domestic captive-produced progeny of any such legally held raptor, whether produced

Specification of critical habitat

Critical habitat is defined as that air, land, or water area the loss of which would significantly decrease the likelihood of conserving a particular endangered or threatened species. Such habitat, if any, is specified at the time the Secretary of Interior proposes to list a new species as endangered or threatened, a matter which is the subject of public notification, meetings and an opportunity for a hearing under the current bill.

By definition, the designation of critical habitat requires an objective, scientific assessment on the part of the Secretary of Interior. The committee bill, unfortunately, ignores this fact by requiring the Secretary to consider economic impacts when designating critical habitat for invertebrate species, and by empowering him to exclude all or part of a biologically critical area on purely economic grounds.

In effect, then, the Secretary is given broad power to grant exemptions to the Endangered Species Act through a simple, unilateral administrative determination of his or her own. This is a process which stands in sharp contrast to the laboriously constructed exemption process, with its clear standards and procedural safeguards, which makes up the heart of the committee bill.

We want to emphasize that we do believe that economic considerations should be considered when weighing the desirability of granting an exemption to the Endangered Species Act. We simply believe that such consideration should be included in the basic exemption process, rather than singled out in a separate procedure where it does not logically belong.

As currently written, the critical habitat provision is a startling section which is wholly inconsistent with the rest of the legislation. It constitutes a loophole which could readily be abused by any Secretary of the Interior who is vulnerable to political pressure, or who is not sympathetic to the basic purposes of the Endangered Species Act.

A sunset provision

The exemption process established by this bill is unwieldy, at best, and virtually everyone agrees that it has potential problems. Committee hearings, moreover, produced considerable evidence that no exemption process may be needed at all.

Accordingly, we would prefer to see a sunset provision for the committee and review board exemption process included in the final bill. Our experience has shown time and time again how difficult it is to abolish a bureaucratic structure once it has been established. We do not intend, by making this suggestion, to prejudge the worth of the exemption procedures established by this bill. We simply point out that its successful functioning is by no means assured, and that a sunset provision would force the Congress to reexamine the work it has been forced to produce so hurriedly this year.

GERRY E. STUDDS.
NORMAN D'AMOURS.
DON BONKER.
JOEL PRITCHARD.
DAVID E. BONIOR.
BARBARA MIKULSKI.